STATE OF MICHIGAN

COURT OF APPEALS

KISHA VAN BUREN, Individually, and as Personal Representative of the Estate of IZEAIR KENDALL BELL,

Plaintiff-Appellant,

v

PANTHER CRANKSHAFTS,

Defendant-Appellee.

UNPUBLISHED
March 6, 2008

No. 275435
Oakland Circuit Court
LC No. 2003-052257-NO

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). This action involves a workplace slip and fall by plaintiff while she was pregnant, the subsequent premature birth and death of her child, allegedly caused by the fall and defendant's negligence, and the interpretation of the exclusive remedy provision, MCL 418.131, of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* Plaintiff filed suit on behalf of herself for her injuries and as personal representative of the deceased child's estate for the child's injuries and death. The dismissal of the estate's claim forms the basis of this appeal. We affirm.

On May 12, 2003, plaintiff, while in the course of her employment as a machine operator for defendant, was returning to her workstation following lunch when she slipped and fell on an oily substance present on the factory floor. The accident report indicates that the substance may have been Rust-Guard or a coolant spray. Accident and injury reports reveal that plaintiff suffered scrapes and bruising to her mid-region as a result of the fall. She did testify that she experienced some abdominal cramping within a few minutes of the fall. Plaintiff was treated at Providence Medical Center. The medical report generated by the hospital's emergency room provides that plaintiff was approximately 25 weeks pregnant, by history, at the time of the fall. After her examination and treatment at Providence, plaintiff was transferred to Henry Ford Hospital for fetal monitoring. An obstetric assessment was performed at Henry Ford on May 13, 2003, and the medical records state that plaintiff did not have any abdominal pain, but was feeling discomfort in her vulvar area and coccyx. There was no indication of harm to the fetus, and plaintiff was provided a work excuse for May 12 and 13; she informed hospital personnel, without objection, that she planned to return to work on May 14.

On May 21 and May 30, 2003, ultrasounds were performed because plaintiff was experiencing some cramping and preterm contractions. She was hospitalized from May 21 through May 23 because of the preterm contractions. According to Henry Ford medical records, on June 7, 2003, plaintiff began having brisk vaginal bleeding, and after evaluation in the labor and delivery unit, which revealed more bleeding and led to a diagnosis of placental abruption, it was decided to deliver the child by cesarean section. Medical records also show that, at birth, the child was suffering from numerous cardiovascular, neurological, and respiratory ailments, deficiencies, and problems, including brain damage, which required the child to be intubated and placed on a ventilator. Medical documents indicate that, following the birth, plaintiff was regularly seen for follow-up care, and these records also show that the child was kept in the neonatal intensive care unit on a ventilator, that a few weeks after the birth the child suffered a bilateral collapse of the lungs and kidney failure, and that plaintiff was spending most of her waking hours at the hospital with her baby. Subsequently, on August 10, 2003, the baby died in the hospital.

Plaintiff's medical expert opined that "the fall caused a chronic abruption that caused the uterus to become irritable, to contract, to shorten the cervix and to initiate preterm labor, and/or an incompetent cervix[,] which led to the delivery of [the child] prematurely." The expert also testified that when plaintiff fell, a small portion of her placenta separated from her uterus, which could have led to the premature delivery. He further concluded that plaintiff's fall set forth the chain of events that led to the child's premature birth and death and that if the child had not been born prematurely, he would not have died.

Plaintiff, in an individual capacity and as personal representative of the child's estate, filed a complaint, and subsequently an amended complaint, against defendant, alleging that she was defendant's employee when the accident occurred, that the accident took place within the scope of her employment, that she was approximately 24 weeks pregnant at the time of the fall, that she slipped on oil as she was in route to her designated work area, that she experienced pain in her back and uterus as a result of the fall, and that the fall resulted in the premature delivery of her baby. Plaintiff further alleged that she suffered physical and emotional injuries as a result of the fall, that the child sustained severe and permanent injuries requiring constant hospitalization as a result of the fall and preterm delivery, and that defendant was negligent in maintaining the workplace, which caused the alleged injuries.

Defendant filed a motion for summary disposition, arguing that plaintiff's and the estate's claims were barred by the exclusive remedy provision of the WDCA, MCL 418.131. MCL 418.131 provides in relevant part:

> (1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. . . .
>
> (2) As used in this section and section 827, "employee" includes the person injured, his or her personal representatives, *and any other person to whom a claim accrues by reason of the injury to, or death of, the employee*[.] [Emphasis added.]

With respect to the claims of the child's estate, defendant particularly argued that the child qualified as an "employee" under the WDCA because his claim, and thus the estate's claim, accrued by reason of the injury to plaintiff. The trial court ruled that plaintiff's individual claim was barred by the WDCA, but the estate's claim was not barred. Defendant appealed to this Court.

A panel of this Court, after examining the allegations raised in plaintiff's complaint, ruled as follows:

> As pleaded, plaintiff's complaint falls within the scope of the WDCA. Plaintiff alleged that her fall at work caused her injuries that caused pre-term labor that caused Izeair's injuries and subsequent death. Thus, plaintiff alleged that Izeair's estate accrued a claim by reason of the injury to plaintiff, the employee. We are constrained by the language used in plaintiff's amended complaint to conclude that her claim, as alleged, falls within the WDCA. Therefore, we reverse the trial court's denial of defendant's motion for summary disposition of the estate's claim, but we remand to afford plaintiff an opportunity to amend her complaint to allege a theory that does not fall within the WDCA. [*Van Buren v Panther Crankshafts*, unpublished opinion per curiam of the Court of Appeals, issued January 31, 2006 (Docket No. 255675), slip op at 3.]

On remand, in an apparent effort to proffer a viable theory as suggested by this Court, plaintiff filed a second amended complaint, alleging that the child, while in utero, slipped and fell on the factory floor, causing him severe injuries that ultimately resulted in his death. Defendant again moved for summary disposition, reasserting its argument that the exclusive remedy provision of the WDCA barred the estate's claim. This time the trial court agreed with defendant, ruling:

> [T]he plaintiff's expert has testified that the mother's fall caused a chronic abruption that caused the uterus to become irritable which caused the cervix to contract or shorten which caused the pre-term labor. The plaintiff has presented no other evidence. Clearly, the expert has described a causal chain that began with injury to the mother and proceeded to the pre-term delivery of the child. The Court of Appeals has ruled in this case that an allegation that "the fall at work caused her injuries that caused pre-term labor that caused [the child's] injuries and subsequent death," is an allegation that would be barred by the WCDA [sic]. Because this is exactly what the only available evidence demonstrates, the Court is constrained to conclude that the child's claim arises by reason of the injury to the mother and it is barred by MCL 418.131(2).

Plaintiff appeals as of right.

A trial court's ruling on a motion for summary disposition, questions of law generally, and matters of statutory construction are all reviewed de novo on appeal. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

The primary goal in construing a statute is to effectuate the Legislature's intent, and the first step in the process of interpreting a statute and divining legislative intent is to examine the language of the statute. *Mt Pleasant, supra* at 53. The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).

Plaintiff argues that by enacting MCL 600.2922a, the Legislature implicitly and effectively repealed the WDCA to the extent that it pertained to actions brought on behalf of fetuses or children born with fetal injuries. Alternatively, plaintiff argues that the WDCA and MCL 600.2922a conflict and must be read to allow a child to pursue an independent cause of action against a workplace tortfeasor.

MCL 600.2922a provides in part:

> (1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus.
>
> (2) This section does not apply to any of the following:
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> (a) An act committed by the pregnant individual.
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> (b) A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.
>
> (c) The lawful dispensation, administration, or prescription of medication.
>
> (3) This section does not prohibit a civil action under any other applicable law.

"As a general rule, repeals by implication are disfavored." *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 491; 618 NW2d 1 (2000). Courts presume that "if the Legislature intended to repeal a statute or a statutory provision, it would have expressly done so." *Id.* If there exists any other reasonable interpretation of statutory provisions, an argument alleging repeal by implication will not be indulged. *Id.* at 491-492. Nonetheless, "a repeal by implication may be found when there is a clear conflict between the two statutes" such that they may not be read harmoniously. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996); *Knauff, supra* at 492.

There is no sound legal basis to conclude that the Legislature implicitly repealed the WDCA relative to injuries implicating MCL 600.2922a, nor does the WDCA conflict with MCL 600.2922a. MCL 600.2922a and MCL 418.131 can be construed harmoniously. Reading the statutes harmoniously, a party has a cause of action relative to negligent acts causing

miscarriages, stillbirths, or injuries or death to an embryo or fetus, but if the conduct occurs in the context of the employer-employee relationship, such that the WDCA is implicated, any right of recovery is limited to benefits under the WDCA.[1] As there is no conflict between the statutory provisions, it is unnecessary to determine which statute is the more specific. See *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007). Accordingly, plaintiff's arguments are rejected.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant because a genuine issue of material fact exists regarding the cause of the child's injuries or death. However, the only evidence on causation presented by plaintiff was the testimony of plaintiff's medical expert, and he opined, as indicated above, that "the fall caused a chronic abruption that caused the uterus to become irritable, to contract, to shorten the cervix and to initiate preterm labor, and/or an incompetent cervix[,] which led to the delivery of [the child] prematurely." He further concluded that plaintiff's fall set forth the chain of events that led to the child's premature birth and death and that if the child had not been born prematurely, he would not have died. This evidence, presented after remand, mimicked the allegations in the first amended complaint, which the prior panel found constituted allegations that the estate's claim accrued by reason of the injury to plaintiff, thereby falling within the parameters of the "employee" definition in MCL 418.131(2). Accordingly, reversal is unwarranted, but we reach this conclusion only because of the law of the case doctrine.

In *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), the Michigan Supreme Court, explaining the principles regarding the law of the case doctrine, stated:

> Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals.
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> Law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal. [Citations, footnote, and internal quotations omitted.]

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[1] The problem with plaintiff's argument is that it runs contrary to the basic premise of the WDCA that otherwise permissible tort actions, such as those brought under MCL 600.2922a, are barred in the employer-employee arena, with recovery limited to amounts allowable under the WDCA.

The rationale behind the law of the case doctrine is to maintain consistency and to avoid reconsideration of issues and matters previously decided during the course of a particular lawsuit. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). A conclusion by this Court that a prior appellate decision in the same case constituted error is not sufficient, in and of itself, to justify ignoring the doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992). "Normally, the law of the case applies regardless of the correctness of the prior decision, but the doctrine is not inflexible." *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). Ultimately, the law of the case doctrine is discretionary, does not limit the power of the appellate court, and it merely expresses the general practice of the courts. *Schumacher, supra* at 128; *Foreman v Foreman*, 266 Mich App 132, 140; 701 NW2d 167 (2005); *Freeman, supra* at 37.

Although we recognize that the doctrine of law of the case is discretionary, the case law indicates that we should not refuse to invoke the doctrine simply because of a disagreement with the prior panel's legal ruling. Accordingly, we will abide by the doctrine and not disturb the prior ruling. However, we respectfully, yet vigorously, disagree with the earlier panel's ruling. We would find that the allegations were sufficient to state a cause of action in tort outside the scope of the WDCA. The evidence, in our opinion, dictated a finding that, as a matter of law, the child was not an "employee" under MCL 418.131(2). The estate's claim did not accrue by reason of the injuries to plaintiff. Rather, the estate's claim accrued by reason of the physical injuries sustained by the child himself. Medical records show that the child was suffering from numerous cardiovascular, neurological, and respiratory ailments, deficiencies, and problems, including brain damage, which required the child to be intubated and placed on a ventilator, and which eventually led to his death. Plaintiff's injuries merely served to establish a chain of causation between the fall and the child's physical injuries. In other words, plaintiff's injuries reflected the vehicle, conduit, or physiological pathway by and through which the fall, allegedly resulting from defendant's negligence, ultimately caused physical harm to the child. We do not view MCL 418.131(2) as encompassing situations in which the employee's injuries merely establish a causal link between the negligent act and physical injury to another person.[2] Rather,

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[2] To rule otherwise would lead to the absurdity of third persons being deprived of a tort action when they are physically injured by an employer's negligence merely because an employee's injury established a causal link between the negligence and the third party's physical injury. One example would be a grocery store patron being physically injured when an employee slips and falls at work, as a result of the employer's negligence, with the falling employee striking the nearby patron, thereby causing the injury. Another example would be a situation in which an employee contracts a severe or fatal illness or disease due to an employer's negligence and then innocently transmits the illness or disease to a third person. As a final example, imagine a pedestrian being killed after being struck by a motor vehicle driven by an employee, which accident was caused when the employee lost consciousness after first hitting an obstacle following a failure of the vehicle's brakes due to employer negligence. The Legislature clearly did not intend that the store patron, the disease-inflicted third person, and the pedestrian, in our examples, be classified as "employees" for purposes of the exclusive remedy provision of the WDCA. This is because their claims or causes of action did not accrue by reason of the employees' injuries; rather, they accrued because of their own physical injuries that resulted from the employers' negligence.

the exclusive remedy provision applies when the employee's injury, in and of itself, establishes a cause of action for, or a basis for recovery by, the other person. *Hesse v Ashland Oil, Inc*, 466 Mich 21; 642 NW2d 330 (2002), is distinguishable because there the plaintiff parents did not suffer physical injuries as a result of the employer's negligence. Rather, they brought a claim of negligent infliction of emotional distress based on injuries to their employee son who was burned in a workplace fire. Here, the estate's claim or cause of action is not based on plaintiff's injuries.

We find support for our position in *Jarvis v Providence Hosp*, 178 Mich App 586; 444 NW2d 236 (1989). In *Jarvis*, the plaintiff filed a complaint against her employer as the personal representative of her daughter's estate after her daughter died in utero following the plaintiff's exposure to hepatitis that occurred at work when she cut her finger on a vial in the employer's laboratory. The plaintiff contracted hepatitis, and the fetus was delivered stillborn. *Id.* at 588-589. The plaintiff's expert opined that "the death resulted from the hepatits contracted by [the plaintiff.]" *Id.* at 589. The *Jarvis* panel mainly focused on the issue of "whether a wrongful death action may be maintained on behalf of a fetus that was not viable at the time of the tortfeasor's negligent conduct but which was viable at the time of the resulting injury." *Id.* at 590. Additionally, the Court did not address the "employee" definition contained in MCL 418.131(2). However, in finding that such a cause of action was proper and in affirming the jury's verdict in favor of the plaintiff, this Court made the comment that "[a]ny decision to extend the exclusive remedy provision of the Workers' Disability Compensation Act to limit the protection given to fetuses must be made by the Legislature." *Id.* at 597.[3] We can only conclude, therefore, that the Court saw nothing in the WDCA that would bar a tort action on behalf of an injured fetus.

Moreover, our review of case law that has developed across the country relative to this issue shows that comparable worker's compensation laws[4] have been interpreted in a manner consistent with our approach. *Meyer v Burger King Corp*, 144 Wash 2d 160; 26 P3d 925 (2001); *Omori v Jowa Hawaii Co, Ltd*, 91 Hawaii 157; 981 P2d 714 (1999); *Snyder v Michael's Stores, Inc*, 16 Cal 4th 991; 945 P2d 781 (1997); *Ransburg Industries v Brown*, 659 NE2d 1081 (Ind App, 1996); *Hitachi Chem Electro-Products, Inc v Gurley*, 219 Ga App 675, 677; 466 SE2d 867 (1995); *Pizza Hut of America, Inc v Keefe*, 900 P2d 97 (Colo, 1995); *Jackson v Tastykake, Inc*, 437 Pa Super 34; 648 A2d 1214 (1994); *Namislo v Akzo Chemicals, Inc*, 620 So2d 573 (Ala, 1993); *Thompson v Pizza Hut of America, Inc*, 767 F Supp 916 (ND Ill, 1991); *Cushing v Time Saver Stores, Inc*, 552 So2d 730 (La App, 1990); *Woerth v United States*, 714 F2d 648 (CA 6, 1983). These cases support the proposition that exclusive remedy provisions in worker's compensation statutes do not bar a child from bringing an action for his or her own physical injuries sustained either in utero or on premature birth that resulted from work-related negligence

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[3] The definition of "employee" in MCL 418.131 at the time *Jarvis* was decided, 1972 PA 285, is substantially the same as the current version of MCL 418.131. See *Jordan v Solventol Chemical Products, Inc*, 74 Mich App 113, 115-116; 253 NW2d 676 (1977).

[4] Many of these cases involve exclusivity provisions that bar tort claims brought by persons "on account of" injuries to an employee. There is no discernible difference between such language and the "by reason of" language found in MCL 418.131(2).

of the mother's employer towards the child's mother, regardless of whether the mother was also injured or whether the child's physical injuries flowed from injuries to the mother.

In sum, we would have permitted this action to proceed absent the constraints of the law of the case doctrine.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello